

July 28, 2017

VIA ECF AND EMAIL (sullivanysdchambers@nysd.uscourts.gov)

Honorable Richard J. Sullivan
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2104
Courtroom 905
New York, NY 10007

RE: *David Lane Johnson v. National Football League Players Association, et al.*
Case No. 17-cv-05131-RJS

Dear Judge Sullivan:

Pursuant to your July 19, 2017 Order (Doc. No. 72), Plaintiff David Lane Johnson (“Johnson”), Defendants National Football League (the “NFL”) and National Football League Management Council (the “NFLMC”) (together the “NFL Defendants”), and Defendant the National Football League Players Association (the “NFLPA” and together with the “NFL Defendants,” the “Defendants”) submit this joint letter detailing the status of the subject case. The parties respond to each of your numbered requests as follows (where appropriate the responses are separated by party):

(1) *A brief statement of the nature of the action and the principal defenses thereto*

Johnson: Johnson is a professional football player. His *First Amended Complaint and Petition to Vacate Arbitration Award* (Doc. No. 39) (“FAC”) includes eleven causes of action, arising from Johnson’s appeal and arbitration of a 10-game suspension, and related penalties, he received for allegedly violating the National Football League Policy on Performance-Enhancing Substances 2015 (“Policy”). Johnson alleges numerous procedural and substantive defects throughout the appeal, including, but not limited to: Defendants failed to properly assign an arbitrator to hear the appeal; the arbitrator they assigned failed to disclose conflicts to Johnson, despite his law firm actively doing work for the NFL Defendants; the NFL Defendants withheld discovery the arbitrator ordered produced; Defendants, with the assistance of the arbitrator, denied Johnson procedural safeguards set forth in the Policy; and Defendants refused to provide Johnson a complete copy of the collectively bargained Policy under which the NFL Defendants were disciplining him. Johnson’s first six causes of action seek to vacate the arbitration award, upholding the 10-game suspension and related penalties, under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (“Section 301”), or Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10 (“FAA”).

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Johnson's seventh cause of action is against the NFL Defendants for breaching the Policy under Section 301. Johnson's eighth and tenth causes of action are against the NFLPA for breach of its duty of fair representation under Section 301. Johnson's ninth cause of action is against the NFLPA for violating the Labor Management Reporting and Disclosure Act ("LMRDA") for refusing to provide Johnson a complete copy of the Policy and retaliating against him for asserting his rights, 29 U.S.C. § 401 *et seq.* Johnson's eleventh cause of action seeks a declaratory judgment under 28 U.S.C. § 2201.

NFLPA: This action constitutes Johnson's campaign to blame his own union (among others) for a neutral arbitrator denying Johnson's appeal from a 10-game suspension for his second violation of the Policy. But Johnson has no one to blame other than himself. The binding arbitration award and arbitral record chronicle Johnson's sworn admission that he purposely took from an unidentified "friend" a "non-FDA approved" substance that is banned by the Policy. Johnson widely publicized his November 2016 filing of unfair labor practice charges against the NFLPA and NFLMC with the National Labor Relations Board ("NLRB") but recently withdrew those charges following the NLRB's investigation.

Johnson seeks to vacate the arbitration award and further alleges that the NFLPA violated its duty of fair representation ("DFR") in tandem with the NFL violating the Collective Bargaining Agreement—a classic "hybrid" claim under Section 301. Johnson cannot possibly satisfy Second Circuit standards for vacatur. And for hybrid Section 301/DFR claims, it is the plaintiff's burden to demonstrate a causal connection between the union's wrongful conduct and his injuries, showing that the breach must have contributed to the arbitrator's making an erroneous decision. But Johnson cannot show that any alleged NFLPA conduct—as opposed to his own conduct—caused the denial of his arbitral appeal. Moreover, Johnson's DFR, LMRDA and declaratory judgment claims against the NFLPA independently should be dismissed because Johnson has failed to plead subject matter jurisdiction or to state any claim. Specifically, Johnson has not pleaded and cannot plead that any of his claimed injuries—all of which flow from the denial of his arbitral appeal and ensuing suspension and financial/contractual penalties—are traceable to the NFLPA.

NFL Defendants: The NFL Defendants maintain that Johnson's claims regarding the arbitrator's authority and alleged bias are meritless and have been waived. In addition, Plaintiff's remaining challenges to the arbitrator's procedural and substantive rulings are not grounds for vacatur under the well-established and highly deferential standard of review afforded to labor arbitration awards in the Second Circuit.

(2) *A brief explanation of why jurisdiction and venue lie in this Court*

Johnson: Johnson originally filed this action in the United States District Court for the Northern District of Ohio, which he considered a proper venue with jurisdiction. Defendants sought to transfer this case to this Court. Johnson did not contest that this Court is a proper venue or that it has jurisdiction over his claims.

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NFLPA: The NFLPA believes jurisdiction and venue lie in this Court for the reasons set forth in the Ohio Court's Order transferring this action (Doc. No. 68).

NFL Defendants: Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1331 because Johnson brings claims under federal statutes. Venue is proper in this Court pursuant to: (1) 29 U.S.C. § 185(a), with respect to claims under the LMRA; (2) 9 U.S.C. § 10(a), with respect to claims under the FAA; and (3) 28 U.S.C. § 1391(b)(2) with respect to claims under the Declaratory Judgment Act. The arbitration award was issued from New York, New York following an arbitration that took place in New York City. The NFL Defendants believe jurisdiction and venue lie in this Court for the reasons set forth above and in the Ohio Court's Order transferring this action (Doc. No. 68).

(3) *A brief description of all outstanding motions and/or outstanding requests to file motions*

Pursuant to the *Memorandum Opinion and Order* transferring this case to this Court (Doc. No. 68), the following three Motions are outstanding:

1. Johnson's *Refiled Motion to Vacate Arbitration Award under the Federal Arbitration Act*, 9 U.S.C. §§ 1-16 (Doc. No. 52);
2. The NFLPA's *Motion to Compel Plaintiff to Comply with Initial Standing Order* (Doc. No. 63); and
3. The NFL Defendants' *Motion to Strike Plaintiff's Reply in Support of the Motion to Vacate Arbitration Award* (Doc. No. 65).

(4) *A brief description of any discovery that has already taken place, and that which will be necessary for the parties to engage in meaningful settlement negotiations*

Johnson: Even without the benefit of discovery, Johnson has significant evidence in support of his claims. Allowing discovery will serve the interests of justice by providing Johnson the ability to fully expose the extent of the arbitrator's conflicts, the arbitrator's misconduct, and the Defendants' misconduct.

The transferring court never held a case management or scheduling conference. As such, the parties never conducted a Rule 26(f) Conference or exchanged Rule 26(a) initial disclosures. Johnson is amenable to and prepared to participate in both a Rule 26(f) Conference and exchange initial disclosures.

As transferring Judge Sara Lioi typically allows discovery prior the Rule 26(f) Conference, on January 11, 2017, Johnson served discovery, including requests for admission, interrogatories, and requests for production of documents, on each Defendant. To date, Johnson has not received responses to his discovery requests. Additionally, Johnson issued a subpoena to Dr. John A. Lombardo, who Defendants jointly selected and paid to serve as the Policy's Independent Administrator. Johnson also issued a subpoena to the UCLA Olympic Analytical Laboratory, which tested his allegedly positive specimen. Despite multiple

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attempts at service, Dr. Lombardo has not been served with the subpoena. The UCLA Olympic Analytical Laboratory has not provided a substantive response to Johnson's subpoena.

NFLPA: On January 11, 2017, Johnson emailed the NFLPA with 62 requests for production, 19 requests for admission, and 8 interrogatories. On February 10, 2017, the NFLPA informed Johnson that the NFLPA would not be responding to these requests in light of Judge Lioi's Order granting a stay of proceedings (Doc. No. 36). The NFLPA further noted that Johnson's requests were also premature and in violation of Federal Rule of Civil Procedure 26(d). More than 5 months later, Johnson has never responded to the NFLPA's letter.

Discovery is neither necessary nor appropriate in this case for Johnson's vacatur motion, as confirmed by Johnson filing his motion to vacate on January 6, 2017 (Doc. No. 3) and then amending and refiled it on March 17, 2017 (Doc. No. 52) without taking any discovery. If Johnson's motion to vacate were granted *and* the NFLPA's planned motion to dismiss were denied, and Johnson was in turn permitted to pursue his DFR or LMRDA claims against the NFLPA, only then would any discovery become appropriate.

NFL Defendants: On January 11, 2017, Johnson also emailed the NFL Defendants requests for production, requests for admission and interrogatories. On February 7, 2017, the NFL Defendants objected to the discovery, and informed Johnson that the requests were premature and improper under Federal Rule of Procedure 26(d). The NFL Defendants maintain that discovery is not appropriate in an action to vacate an arbitration award, as Johnson's case against the NFL Defendants may be resolved based on the record created during the arbitration.

(5) *A list of all prior settlement discussions, including the date, the parties involved, and the approximate duration of such discussions, if any*

In light of U.S. District Court for the Northern District of Ohio Judge Sara Lioi's encouragement to the parties "to consider resolving this case on mutually-agreement terms" (Doc. No. 51), on April 28, 2017, Johnson made a written settlement demand to both the NFL Defendants and NFLPA. On May 9, 2017, the NFLPA rejected Johnson's demand. To date, the NFL Defendants have not responded to Johnson's demand. The NFL Defendants do not believe this is an appropriate case for settlement.

(6) *The estimated length of trial*

Johnson: Johnson anticipates trial taking three to five days.

NFLPA: The NFLPA anticipates that Johnson's motion to vacate and the NFLPA's planned motion to dismiss could each be resolved in a hearing. If Johnson were eventually permitted to proceed with his DFR and/or LMRDA claims against the NFLPA, then the NFLPA agrees with Johnson that any trial would take approximately three to five days.

NFL Defendants: The NFL Defendants do not believe a trial will be necessary as the resolution of the motion to vacate the arbitration will resolve their dispute with Johnson.

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(7) ***Any other information that the parties believe may assist this Court in resolving this action***

Johnson: If this Court determines that Second Circuit law applies, Johnson respectfully proposes, in the interests of efficiency and cost, that the parties supplement existing briefing as necessary to address differences in analysis of the issues under the law of the Second Circuit.

NFLPA: The NFLPA intends to file a pre-motion conference letter seeking permission to file a motion to dismiss the FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The NFLPA concurs with Johnson that briefing on Johnson's vacatur motion needs to be revised to address Second Circuit law and will do so however the Court prefers, whether through supplemental briefs, new briefs, or some other procedure.

NFL Defendants: The NFL Defendants plan to seek leave to file a motion to stay the filing of their responsive pleadings until the Court has addressed Plaintiff's pending motion to vacate. The NFL Defendants submit that such a stay in this case is appropriate, given that this Court's denial of plaintiff's motion to vacate would obviate the need for the NFL Defendants to file a responsive pleading. *See Fried v. Lehman Bros. Real Estate Assocs. III, L.P.*, No. 11 Civ. 4141 BSJ, 2012 WL 252139, at *5 (S.D.N.Y. Jan. 25, 2012) (listing factors to consider in determining whether to grant a motion to stay and noting that "the ultimate decision lies firmly in the discretion of the Court"); *see also Harris v. Nassau Cnty*, No. 13-CV-4728, 2014 WL 3491286, at *4 (E.D.N.Y. July 8, 2014) (granting motion to stay proceedings where issues would be narrowed before the court, and parties would be prevented from "performing unnecessarily duplicative work," which also furthered "the court's interest in judicial economy and efficiency").

The NFL Defendants concur with the requests of the other parties to supplement prior briefing under Second Circuit law.

Respectfully submitted,

Zashin & Rich Co., L.P.A.

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cc: David Lane Johnson
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